STATE OF MICHIGAN

COURT OF APPEALS

ALISA ASBURY,

Plaintiff-Appellant,

v

SINAI HOSPITAL OF GREATER DETROIT,

Defendant-Appellee.

UNPUBLISHED
February 22, 2007

No. 261533
Wayne Circuit Court
LC No. 03-337531-NH

Before: O'Connell, P.J., and Saad and Talbot, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations). We affirm.

Plaintiff contends that the circuit court erred by granting summary disposition on the basis of its retroactive application of *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), to this case.

This Court reviews de novo a circuit court's summary disposition ruling. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

> Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. In determining whether summary disposition was properly granted under MCR 2.116(C)(7), this Court "consider(s) all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." [*Waltz*, *supra* at 647-648, quoting *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).]

"Whether a period of limitation applies to preclude a party's pursuit of an action constitutes a question of law that [an appellate court] review[s] de novo." *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003). This Court also reviews de novo issues of statutory construction. *Bloomfield Twp v Oakland Co Clerk*, 253 Mich App 1, 9; 654 NW2d 610 (2002).

Plaintiff filed this action on November 12, 2003, alleging that defendant's agents and employees negligently provided care during her birth on May 16, 1984. In 1984, as now, a

medical malpractice plaintiff had two years from the date the cause of action accrued in which to file suit. MCL 600.5805(4).[1] Likewise in 1984, the Legislature provided that a malpractice claim against a

> hospital, licensed health care facility, [or] employee or agent of a hospital or licensed health care facility who is engaging in or otherwise assisting in medical care and treatment . . . *accrues at the time that person discontinues treating or otherwise serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose*, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. [MCL 600.5838(1) (emphasis added).]

Because the complaint avers that defendant's acts of malpractice related to plaintiff's birth occurred between May 16, 1984 and June 22, 1984, when defendant discharged plaintiff, plaintiff's medical malpractice claim accrued by June 22, 1984. Consequently, the applicable two-year period of limitation in MCL 600.5805(4) extended through June 22, 1986.

In 1984 when the infant plaintiff's claim accrued, however, the Legislature afforded minors additional time in which to pursue legal actions. The version of MCL 600.5851 in effect when plaintiff's claim accrued provided, in relevant part, as follows:

> (1) If the person first entitled to make an entry or bring an action is under 18 years of age, insane or imprisoned at the time his claim accrues, he or those claiming under him shall have 1 year after his disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. This section does not lessen the time provided for in section 5852.

This Court has described MCL 600.5851(1) as follows:

> Some published opinions of this Court in which the issue we face was not raised have unfortunately referred to § 5851 as a provision "which tolls the statute of limitations." . . . We believe that this generalization is incorrect; perhaps a more accurate description of § 5851 is found in the statute itself—a year of grace.
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> Section 5851 does not expressly provide for the tolling of the general statute of limitations. Rather, it allows disabled plaintiffs additional, separate protection from the bar of the statute of limitations, protection that is independent of the running of the statute. By its terms, § 5851 allows plaintiffs under certain disabilities to bring an action "1 year after the disability is removed . . . *although*

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[1] This opinion refers to the malpractice period of limitation, MCL 600.5805(4), and the malpractice accrual statute, MCL 600.5838, in effect in 1984, because "[t]he pertinent statute of limitations is the one in effect when the plaintiff's cause of action arose." *Casey v Henry Ford Health Sys*, 235 Mich App 449, 451 n 1; 597 NW2d 840 (1999) (internal quotation omitted).

> *the period of limitations has run*." The clear meaning of the emphasized language is that § 5851 does not toll the running of the statute of limitations, but instead exempts certain claims from the bar of the statute. . . . [*Honig v Liddy*, 199 Mich App 1, 3-4; 500 NW2d 745 (1993) (citations omitted; emphasis in original).]

See also *Vance v Henry Ford Health Sys*, 272 Mich App 426; 726 NW2d 78 (2006).

Considering that plaintiff was born on May 16, 1984, under § 5851(1) her grace period for filing this action extended through May 16, 2003, her nineteenth birthday, despite that the two-year period of limitation in MCL 600.5805(4) had expired. The parties dispute whether plaintiff's April 8, 2003, notice of her intent to sue tolled the applicable period for filing this action.

Before a plaintiff may commence a medical malpractice action, she must "give[] the health professional or health facility written notice under this section not less than 182 days before the action is commenced." MCL 600.2912b(1).[2] According to MCL 600.5856(d):

> *The statutes of limitations or repose are tolled*:
>
> * * *
>
> (d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b. [Emphasis added, footnote omitted.][3]

The Legislature enacted the notice of intent tolling provision within 1993 PA 78. *Morrison v Dickinson*, 217 Mich App 308, 311-312; 551 NW2d 449 (1996). In *Morrison*, *id*. at 311-313, this Court examined in detail the legislation that enacted MCL 600.2912b and MCL 600.5856(d), explaining in relevant part as follows:

> The Legislature made a number of changes to the Revised Judicature Act when it enacted 1993 PA 78, which became effective on April 1, 1994, including three provisions that apply to this case. First, the Legislature adopted a notice provision, providing as follows: . . . [quoting MCL 600.2912b(1)]
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[2] Although § 2912b did not exist in 1984, when plaintiff's cause of action accrued, the Legislature enacted it in 1993 PA 78, which became effective April 1 1994, well before plaintiff commenced this medical malpractice action.

[3] After plaintiff gave notice in April 2003, § 5856(d) became § 5856(c) and was reworded in a manner that does not alter the subsection's meaning.

> Second, the Legislature permitted a tolling of the period of limitation during the 182-day notice period, stating that the applicable period of limitation is tolled . . . . [quoting MCL 600.5856(d)]
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> * * *
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> The third relevant aspect of 1993 PA 78—the pertinent effective dates and the chronological parameters defining to what causes of action the amendments applied—was not codified. 1993 PA 78, § 4 provides as follows:
>
> "(1) Section [ ] . . . 5856 [referring to the tolling provision] of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, do[es] not apply to causes of action arising before October 1, 1993.
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> * * *
>
> (4) Section [ ] 2912b [referring to the notice provision] . . . of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, [applies] to cases filed on or after October 1, 1993."
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> * * *
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> In summary, ... [f]or causes of action *filed* on or after October 1, 1993, a plaintiff must provide 182 days' written notice before commencing suit. 1993 PA 78, § 4(4), MCL 600.2912b . . . . If a cause of action would be barred because of the 182-day notice provision, the limitation period may be tolled for 182 days after notice is given. MCL 600.5856(d) . . . . However, this tolling provision does not apply to causes of action *arising* before October 1, 1993. See 1993 PA 78, § 4(1). [Emphasis in original.]

In this case, plaintiff cannot invoke the notice tolling provision in MCL 600.5856(d) because (1) her cause of action arose in June 1984, and (2) "the plain language of 1993 PA 78, § 4(1)" dictates that MCL 600.5856(d) does "*not* apply to causes of action arising before October 1, 1993." *Morrison*, *supra* at 314 (emphasis in original).

We reject plaintiff's suggestion that the Court's holding in *Morrison*, which applied MCL 600.5856(d) to a cause of action that had arisen before October 1, 1993, should apply to this case. This Court explained as follows the dilemma faced by the plaintiffs in *Morrison*, *supra* at 313-315:

> Applying the statutory scheme outlined above illustrates the Morrisons' dilemma, a dilemma that stems primarily from the Legislature's consideration of the date of filing significant in 1993 PA 78, § 4(4), and its consideration of the date the cause of action arises as significant in 1993 PA 78, § 4(1). The instant plaintiffs' cause of action arose on May 21, 1992. Pursuant to the applicable two-year statute of limitations, the Morrisons were permitted to file their complaint on or before May 21, 1994. . . . . Under MCL 600.2912b . . . , which became

> effective on April 1, 1994, the Morrisons were required to give 182 days' notice to defendants before filing their complaint.
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> The difficulty in the present case arises, however, from the fact that the tolling provision of MCL 600.5856(d) . . . does not apply to plaintiffs. As stated above, their cause of action arose on May 21, 1992, that is, before October 1, 1993. . . .
>
> 1993 PA 78 became effective on April 1, 1994, but by then the Morrisons could not possibly satisfy all the requirements of 1993 PA 78 without running afoul of the notice requirement of MCL 600.2912b . . . and the two-year limitation period of MCL 600.5805(4) . . . .
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> In short, though the Morrisons' cause of action had previously accrued, because of legislative amendment of the pertinent statutes, the Morrisons' claim, as well as the actions of all those potential plaintiffs similarly situated, was vitiated. Implementation of the notice requirement effectively abrogated the Morrisons' claim despite the fact that it had already vested.

This Court concluded that "1993 PA 78, § 4(1) may not be enforced in cases such as the present matter where enforcement would vitiate an accrued medical malpractice claim without providing the potential plaintiff the benefit of the 182-day tolling provision." *Morrison*, *supra* at 318.

This case does not involve procedural facts substantially similar to those addressed in *Morrison*. As in *Morrison*, the notice provision of MCL 600.2912b applies in this case because plaintiff filed this action after April 1, 1994, but the notice tolling provision in MCL 600.5856(d) does not apply because plaintiff's cause of action arose well before October 1, 1993. But unlike *Morrison*, the difference in the effective dates of the 1993 amendments to MCL 600.2912b and MCL 600.5856(d) does not effectively vitiate plaintiff's previously accrued cause of action. By virtue of the minority saving provision in effect in 1984, MCL 600.5851(1), after the accrual of plaintiff's claim in June 1984, she had from April 1, 1994, the effective date of MCL 600.2912b, through November 16, 2002, a period approximately 182 days before the minority grace period expired on plaintiff's nineteenth birthday (May 16, 2003), to comply with the notice of intent requirement and thereafter timely commence her action within the minority grace period. Because plaintiff had approximately 8-1/2 years, between the enactment of MCL 600.2912b in April 1994 and November 2002, in which to give the notice of intent and still timely file suit against defendant, whereas the plaintiffs in *Morrison* had no opportunity to do so, we conclude that the Court's holding in *Morrison* has no application to the very different circumstances of this case.

Because plaintiff's giving of notice of her intent to sue in April 2003 did not toll the minority saving period pursuant to MCL 600.5856(d), and because plaintiff filed suit in November 2003, after the minority saving period had expired in May 2003, defendant was entitled to summary disposition pursuant to MCR 2.116(C)(7), irrespective of the circuit court's

basis for granting the motion. See *FACE Trading, Inc v Dep't of Consumer & Industry Services*, 270 Mich App 653, 678; 717 NW2d 377 (2006) (observing that this Court will not reverse when the trial court reaches a correct result for the wrong reason).

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Michael J. Talbot